

IN THE MATTER OF THE  
*NATURAL PRODUCTS MARKETING (BC) ACT*  
AND  
AN APPEAL FROM A DECISION  
CONCERNING NON-COMPLIANCE WITH CONSOLIDATED GENERAL ORDERS

**BETWEEN:**

KENPO GREENHOUSES LTD.

**APPELLANT**

**AND:**

BRITISH COLUMBIA VEGETABLE MARKETING COMMISSION

**RESPONDENT**

**DECISION**

**APPEARANCES:**

For the British Columbia Marketing Board

Ms. Christine J. Elsaesser, Vice Chair  
Ms. Satwinder Bains, Member  
Mr. Hamish Bruce, Member

For the Appellant

Mr. Y.K. (Ken) Leung

For the Respondent

Ms. Lisa D. Hynes, Counsel

Place of Hearing

Richmond, BC

Date of Hearing

June 7, 2002

## BACKGROUND

1. On January 3, 2002, by way of a letter dated December 28, 2001, Mr. Y. K. (Ken) Leung, on behalf of Kenpo Greenhouses Ltd. ("Kenpo"), filed an appeal of a decision of the British Columbia Vegetable Marketing Commission (the "Vegetable Commission") issued on December 4, 2001.
2. In its decision, the Vegetable Commission concluded that the Appellant had violated the following sections of its General Orders:
  - #52 No Producer shall sell, offer to sell, supply or deliver the Regulated Product to any Person other than an Agency, or such other Person as the Commission may direct or authorize, with the exception of sales to a Consumer by a Producer-Vendor.
  - #54 No Producer or Agency shall sell or offer for sale the Regulated Product and no Person shall buy the Regulated Product at a price less than the minimum price fixed by the Commission from time to time for the variety and grade of the Regulated Product offered for sale, sold or purchased, unless authorized by the Commission.
3. As a result of the foregoing violations of the General Orders, the Appellant was assessed \$3500 towards the costs of the Vegetable Commission's investigation and its Class I Grower's Licence was cancelled. Kenpo was also required to make immediate application for a Class II Grower's Licence.

## ISSUES

4. Should the decision of the Vegetable Commission be overturned on the same grounds as outlined in the Appellant's November 27, 2001 submission, and because the Respondent did not give proper weight to the evidence presented at the November 27 hearing and because that hearing was not transcribed?
5. Is either party entitled to its costs on this appeal?

## FACTS

6. In the spring of 2001, the Vegetable Commission received complaints regarding illegal sales of Long English cucumbers by certain retailers in the Lower Mainland. Initially, investigations were focussed on Right Way Market in Surrey and Cloverdale Market in Cloverdale.
7. By letter dated June 15, 2001, the Vegetable Commission advised Kenpo that as a result of its investigations, it had uncovered evidence of alleged violations of General Orders #52 and #54 by Kenpo and that a hearing into the alleged violations would proceed on July 26, 2001.
8. By letter dated June 18, 2001, Mr. Ken Leung wrote to the Vegetable Commission expressing surprise at the alleged violations and asking for details of the evidence

of the alleged violations uncovered and copies of the relevant legislation and General Orders.

9. On July 3, 2001, the General Manager of the Vegetable Commission, Mr. Murray Dreidiger, met with Mr. Leung. He disclosed the Vegetable Commission's evidence and advised Mr. Leung of the procedure that would be followed at the hearing and the type of remedies that would be sought. The purpose of the meeting was two-fold, first to ensure that any violations by the greenhouse operation had stopped and second, to try and resolve the particular dispute. Mr. Dreidiger also advised Mr. Leung that the Vegetable Commission could seek its costs related to the investigation into the alleged violations. As no settlement was reached, the matter was set for hearing before the Vegetable Commission. Given that Mr. Leung resided outside the country, scheduling the hearing was difficult and the original July 26, 2001 hearing date was adjourned.
10. On November 27, 2001, the Vegetable Commission conducted its hearing into the alleged violations by Kenpo. The Vegetable Commission heard testimony from two of its investigators: Inspector J. H. Maitland and Inspector M. MacLennan. Mr. Leung attended without Counsel and cross-examined the Vegetable Commission's witnesses. Mr. Leung denied knowledge of any violation of the General Orders. In Kenpo's defence, he tendered the Affirmation of Mr. Sonny Huang, the owner of the Right Way Market, to rebut the evidence of Inspectors Maitland and MacLennan. Mr. Leung also presented an extensive legal argument challenging the merits of the case against Kenpo.
11. The hearing before the Vegetable Commission was not transcribed. However, the documentary evidence placed before the Vegetable Commission was before this Panel, which conducted a full hearing on the merits of the alleged contraventions. In addition, the Panel had the benefit of the written argument prepared by Mr. Leung for the November 27 hearing before the Vegetable Commission.
12. In written reasons dated November 27, 2001 and further expanded on in a letter dated December 27, 2001, the Vegetable Commission found Kenpo in violation of General Orders #52 and #54.

## **DECISION**

13. The Appellant argues that the hearing conducted by the Vegetable Commission was flawed and should therefore be set aside. To the extent that the Vegetable Commission sought to recover its costs of investigation while sitting in an adjudicative capacity, the Vegetable Commission had a pecuniary interest in the outcome of the appeal. The Appellant argues that this pecuniary interest creates a perception of bias.
14. The Appellant further argues that the Vegetable Commission violated its right to be fully heard on all material issues of the matter (specifically in reference to the

Vegetable Commission's claim to recover investigative costs). The Appellant argues that the decision to recover \$3500 in investigative costs was *ultra vires* the power and authority given to the Vegetable Commission under the *Natural Products Marketing (BC) Act* (the "Act").

15. The Appellant also takes issue with the failure of the Vegetable Commission to issue reasons for its decision and argues that the Vegetable Commission erred in law by accepting the evidence referred to in its letter dated December 27, 2001 as sufficient proof of Kenpo's violation of General Orders #52 and #54.
16. In response, the Vegetable Commission maintains that its decision was made in accordance with the rules of procedural fairness and was based upon and supported by the evidence before the Vegetable Commission at its hearing. The Vegetable Commission maintains that its written reasons were adequate for Mr. Leung to know what conclusions the Vegetable Commission came to on the principal issues, especially the issue of credibility.
17. Further, the Vegetable Commission argues that the decision to recover costs of investigation was authorised by the Vegetable Commission's enabling legislation. No reasonable apprehension of bias arises from the Vegetable Commission's decision to recover the costs of an investigation that led to the finding that Kenpo had violated the *British Columbia Vegetable Scheme* (the "Scheme") and its General Orders.

### **Standard of Review**

18. Kenpo has filed its appeal pursuant to s. 8(1) of the *Act*. Earlier this year, the British Columbia Supreme Court released its decision in *British Columbia Chicken Marketing Board v. British Columbia Marketing Board*, 2002, B.C.S.C. 610. The decision concerned the standard of review to be applied by the BCMB on appeals from the British Columbia Chicken Marketing Board. Relying on this decision, the Vegetable Commission argued that hearings before the BCMB are not automatically hearings *de novo* and the question to be determined on this appeal is whether the Vegetable Commission erred in fact, in law or in procedure in rendering its decision in respect of Kenpo.
19. On August 16, 2002 (B.C.C.A. 473), the British Columbia Court of Appeal overturned the Supreme Court decision, finding that an appeal to the BCMB is a full hearing on the merits. The BCMB is entitled to substitute its decision where the decision below was incorrect. The Court of Appeal found that there is nothing in the legislation to suggest that the BCMB give any deference, or any significant deference, to the decision of a commodity board and that the BCMB has the power to conduct a full hearing and to determine the facts and the issues before it. The BCMB as a specialized tribunal is expected to use that expertise in coming to a reasoned decision on an appeal.

### Standard of Proof

20. The Appellant argues that as the Vegetable Commission is seeking to administer a statute, the standard of proof required is “proof beyond reasonable doubt”. Further, the Appellant argues that as it made a similar submission at the outset of its hearing before the Vegetable Commission, and as the Vegetable Commission did not challenge that view, the relevant standard of proof is a settled issue that is no longer open to election by the Vegetable Commission.
21. The Vegetable Commission argues that it is entitled to render a decision on violations of General Orders, based on a “balance of probabilities”. It is an administrative tribunal charged with regulating the vegetable industry in British Columbia. Section 11 of the *Act* grants the Vegetable Commission the authority to cancel licences for violations of its *Scheme* or General Orders. Hearings before the Vegetable Commission under its licensing authority are civil not criminal proceedings and as such, the civil standard of proof applies.
22. The Vegetable Commission argues that the civil standard of proof even applies to administrative tribunal decisions which are “criminal” in nature, for example violations under the *Securities Act* proceed under a civil standard of proof: *Rak v. British Columbia (Superintendent of Brokers)* (1990), 51 B.C.L.R. (2d) 27 (B.C.C.A.).
23. Finally, the Vegetable Commission argues that it cannot be estopped from applying the lower civil standard of proof because it remained silent when the Appellant first raised the suggestion that the higher criminal standard of proof applied. The Vegetable Commission argues that it heard the Appellant’s submissions, considered the matter and rendered its decision on standard of proof together with its other findings. The question of the standard of proof is a legal issue. The Vegetable Commission was correct in its decision as to the appropriate standard of proof to apply in these circumstances.
24. The Panel agrees that a violation under Vegetable Commission General Orders proceeds on the civil standard of proof: a balance of probabilities.

### Hearing Before the Vegetable Commission

25. The Appellant, both before the Vegetable Commission and before the Panel, took issue with the case presented against it. The Appellant maintains that the Vegetable Commission failed to discharge the evidentiary and legal burden necessary to prove a violation. It argues that there was no evidence from which the Vegetable Commission could reasonably have inferred that the cucumbers sold at the Right Way Market originated from Kenpo. The Appellant further argues that the finding of a violation by the Vegetable Commission is further evidence of its bias against

Kenpo. More will be said on this bias issue later.

26. In order to deal with this submission, it is necessary to review the nature of the case presented against Kenpo before the Vegetable Commission. The evidence can be summarised as follows:

- a) At the instruction of the Vegetable Commission, on May 24, 2001, Inspector Maitland attended at the Right Way Market, on 96<sup>th</sup> Avenue in Surrey, where he observed Long English cucumbers being sold without appropriate labelling from the Vegetable Commission's designated agency, in this case BC Hot House Foods Inc. ("BC Hot House"). The cucumbers were hand-wrapped as opposed to shrink-wrapped as required. Based on the foregoing, Inspector Maitland concluded that Right Way Market was selling illegal produce.
- b) Inspector Maitland then attended at Cloverdale Market and confirmed that "bootlegged" cucumbers were also being sold there.
- c) Later that same day, Inspector Maitland returned to Right Way Market. A young male employee advised that a further shipment of Long English cucumbers was expected that day. Inspector Maitland then contacted another Inspector, M. MacLennan, and advised him to attend at Right Way Market.
- d) At approximately 2:10 p.m., a white GMC van (BC Licence Plate 8718-FA) pulled up to the loading bay at Right Way Market. The driver unloaded 13 boxes (with original labels for bananas, apples and beer) of hand-wrapped Long English cucumbers. The driver then took out some paper work from the cab of the truck and went into the store and spoke to a gentleman. The paper work was signed and the driver handed the gentleman a slip of paper. The driver returned to his van and left the store. Inspector MacLennan followed the van to the Kenpo Greenhouses at 222 – 172<sup>nd</sup> Street in Surrey. A subsequent check of the licence plates revealed that the registered owner of the van was not Kenpo; the driver remains unidentified.
- e) After the van left, Inspector Maitland photographed the 13 boxes of Long English cucumbers. He then spoke with the gentleman who had been observed talking with the driver of the van. This gentleman directed Inspector Maitland to the owner of the Market, Mr. Sonny Huang. After identifying himself, Inspector Maitland advised that he had just witnessed the delivery of cucumbers he believed were "bootlegged". He asked to see the invoice or purchase slip for the delivery. Mr. Huang went into his office and removed the top slip from a clip on the wall and handed it over to Inspector Maitland.

- f) The invoice was hand written on a prepared form and stated:

RECEIPT: 353519 dated May 23/01

KENPO GH LTD  
SURREY B.C.

SOLD TO RIGHT WAY MARKET SHIP TO SAME  
ADDRESS SURREY BC

13 BOX CUCUMBER	13 BOX	PRICE	AMOUNT
	<u>*50 PCE</u>	0.624	403.00
	650 PCE		

650 PEC (sic) TOTAL 403.00

- g) The price of \$0.624 was below the regulated wholesale price established through the designated agency at that time. The minimum price established for that week ranged from \$0.722 to \$1.11 depending on grade and quality.
- h) In response to Inspector Maitland's request, Mr. Huang provided his contact numbers for ordering more product. These numbers were written on a list on the wall next to the phone, and were recorded by Inspector Maitland as 538-1027, 313-8066, Cell 785-2650. Inspector Maitland asked if he could purchase a cucumber and was told he could take one.
- i) Upon leaving the store, Inspector Maitland contacted phone number 538-1027. A gentleman answered the phone "Kenpo Greenhouse". Inspector Maitland inquired about possibly buying good quality cucumbers. The gentleman said that they were only selling #2 cucumbers. At that time, a phone rang in the background and the gentleman said to hold and then answered the other phone. During the conversation, Inspector Maitland overheard him say "What? He followed my guy?" The conversation then became inaudible and a short time later, the gentleman returned to the phone, his demeanor abrupt and he hung up the phone.
- j) On June 14-15, 2001, Inspector Maitland conducted surveillance at the Cloverdale Market on 176<sup>th</sup> St. in Cloverdale. Hand-wrapped Long English cucumbers were being offered for sale without the approved BC Hot House sticker. The female owner/manager (Raminder) of the Cloverdale Market confirmed that Right Way Market regularly supplied them with shipments of cucumbers.
- k) Inspector Maitland, in the company of Inspector J. Schwarz, again attended Right Way Market on June 15, 2001.
27. To refute the case presented by the Inspectors for the Vegetable Commission, the Appellant introduced the Affirmation of Sonny Huang. Mr. Huang did not appear

as a witness either before the Vegetable Commission or at the hearing of this appeal. In his Affirmation, Mr. Huang makes the following statements:

- He is the owner and operator of Right Way Market.
  - On July 19, 2001 he received, from Kenpo employee Mr. Gurdip Bath, copies of the two reports prepared by Mr. Maitland for the Vegetable Commission.
  - The reports are untrue with respect to statements attributed to Mr. Huang.
  - Although Mr. Maitland visited the store on May 24 and June 15, 2001, the circumstances were substantially different than described in the reports.
  - Mr. Maitland entered the premises without permission or proper cause and violated his legal rights.
  - Mr. Maitland repeatedly sought to coerce Mr. Huang with the obvious intention of extracting incriminating statements about Kenpo making direct sales through his store.
  - Mr. Huang denies ever buying cucumbers from Kenpo.
  - After being unsuccessful in obtaining admissions about an illegal transaction between Kenpo and his store on his first attempt, Mr. Maitland returned on June 15, 2001 for a second attempt.
  - In the June 15, 2001 conversation, Mr. Huang denied any knowledge of Kenpo. Mr. Maitland then threatened to call Revenue Canada to audit his store.
  - Mr. Maitland left and had a cup of coffee. On his return, he promised that he would not give Kenpo any trouble. Mr. Huang stated that although he did not know where the cucumbers came from, what difference did it make if Mr. Maitland was not going after anyone. In an attempt to get Mr. Maitland to leave, Mr. Huang stated that the cucumbers might have come from Kenpo, even though he did not actually know where they came from.
  - Mr. Huang denies confirming that the cucumbers came from Kenpo but rather states that he succumbed to duress and went along with Mr. Maitland's assertion.
  - Mr. Huang states that it was Mr. Maitland who first brought up the name Kenpo. Mr. Huang denies suggesting or confirming that Kenpo delivered cucumbers to Right Way Market.
  - Mr. Huang denies knowing Kenpo, denies buying anything from Kenpo and denies knowing what bootlegged cucumbers were.
  - Mr. Huang states that as he had no business dealings with Kenpo, he has no reason to believe that the invoice came from Kenpo.
  - Mr. Huang denies giving Mr. Maitland any contact numbers for Kenpo. Mr. Maitland wrote down several phone numbers from the contact list on the wall but Mr. Huang did not have any numbers belonging to Kenpo. Mr. Huang suggests that Mr. Maitland obtained these phone numbers elsewhere.
28. Such was the case before the Vegetable Commission. From its reasons, it is apparent that the Vegetable Commission discounted the version of events related in Mr. Huang's Affirmation and preferred the evidence of its Inspectors, both of

whom were retired police officers.

### **Findings of the British Columbia Marketing Board**

29. In reviewing the above evidence, the Panel is of the opinion, on the balance of probabilities, that Kenpo violated General Order #52 – that is Kenpo sold or offered to sell, supplied or delivered Regulated Product to a Person other than an Agency authorized by the Vegetable Commission.
30. In particular, the Panel finds as follows on the evidence:
- Hand-wrapped cucumbers (without proper agency labels or codes) were sold at Right Way Market;
  - 13 “banana” boxes of hand-wrapped cucumbers were delivered to Right Way Market in a white van on May 24, 2001;
  - The driver of the van was observed giving paper work to a Right Way Market employee;
  - The white van was then followed to Kenpo; and
  - The owner of Right Way Market, Mr. Huang, gave Inspector Maitland a copy of the hand-written invoice identifying the delivered cucumbers as 13 boxes containing 50 cucumbers each received from Kenpo.
31. This evidence alone is adequate to make out a violation of General Order #52. However, in addition to the above evidence, Inspector Maitland further testified as follows, which evidence we accept based on our consideration of the testimony in light of all the circumstances of the case, and which evidence reinforces our view that General Order #52 was breached:
- Mr. Huang gave him three contact numbers for obtaining cucumbers;
  - Upon calling one number, a gentleman answered “Kenpo Greenhouse”;
  - Inspector Maitland had a conversation with this gentleman about purchasing cucumbers. While talking to this gentleman, Inspector Maitland heard a telephone ring in the background; the gentleman took the call and was overheard saying “What? He followed my guy?” Upon returning to his call with Inspector Maitland, the gentleman’s demeanour changed, he was curt and denied having any cucumbers to sell.
32. It may be argued that the contents of this conversation, sought to be admitted for the truth of its contents, are hearsay. However, the statement is an admission against interest made by a party to this action and is therefore admissible under the rules of evidence. Moreover, it is important to note that section 6(7) of Regulation 328/75 to the *Act* allows the BCMB to receive evidence or information, as it in its discretion considers necessary and appropriate, whether or not such evidence or information would be admissible in court of law. We find this conversation reliable and highly persuasive evidence of Kenpo’s knowledge of and involvement in the

alleged violations and as such it is both necessary and appropriate that it be admitted.

33. With respect to the violation of General Order #54, the Vegetable Commission's decision dated November 27, 2001 and its supplementary reasons dated December 27, 2001 made a finding that the cucumbers sold to Right Way Market on May 24, 2001 for \$0.624, were sold below the then posted wholesale price of between \$0.722 and \$1.11 depending on quality and grade. This position was reiterated in its written argument. The Appellant's main argument was that there was insufficient evidence to link these particular cucumbers to Kenpo; it did not take issue with the fact that the cucumbers were sold for less than the minimum price. With respect to the necessary elements to demonstrate a breach of General Orders #52 and #54, the Appellant did not introduce any contrary evidence other than the Affirmation of Mr. Huang.
34. With respect to the Affirmation of Mr. Huang, the Vegetable Commission did not accept this Affirmation evidence and neither does this Panel. This is the risk associated with relying on affidavit (affirmation) evidence where the witness is not made available for cross-examination. Mr. Huang was not present to be cross-examined on what amounted to extremely controversial testimony raising serious issues of impropriety on the part of Vegetable Commission Inspectors. These accusations represent a serious attack on the Inspectors' credibility and as such should not be made lightly by the Appellant, and certainly not without making its deponent available for questioning.
35. On many points, Inspector Maitland and Mr. Huang are diametrically opposed in their evidence. The Panel finds no fault with the Vegetable Commission preferring the evidence of its Inspectors to that of Mr. Huang's Affirmation. Further, the Vegetable Commission was not obligated to accept Mr. Leung's interpretation of what Mr. Maitland said in evidence. The Vegetable Commission heard all the evidence before it and came to its decision. More importantly, the appeal before the BCMB gave Mr. Leung the opportunity to further advance his arguments, and any evidence he wished to tender.
36. Before this Panel, Inspector Maitland was questioned by both Counsel for the Vegetable Commission and Mr. Leung as to the coercion alleged by the Appellant. Inspector Maitland denied coercing Mr. Huang. He does not believe that he mentioned Revenue Canada but rather believes that Inspector Schwarz raised this issue. Apparently, Mr. Huang indicated that a "BS Farms" had supplied him with cucumbers intimating that this was not a real farm. Inspector Schwarz apparently cautioned Mr. Huang about making out cheques to suppliers that did not exist as that could create problems with Revenue Canada. Inspector Maitland does not recall an "audit" being mentioned. Inspector Maitland denies that the tenor of the June 15 conversation was in any way threatening. Rather, Mr. Huang appeared torn

between assisting the Inspectors and not giving up information about his suppliers.

37. The Panel has no hesitation in concluding that Inspector Maitland was a credible, straightforward witness in both his direct evidence and on cross-examination. His testimony is consistent with all the surrounding circumstances. Where his evidence conflicts with the Affirmation of Mr. Huang, the Panel prefers the evidence of Inspector Maitland.
38. As for the Huang Affirmation, the Panel finds that it is inconsistent and not believable. It is, as noted above, problematic that the Appellant did not call Mr. Huang as a witness. Moreover, on the merits of the Affirmation itself, although Mr. Huang affirms that he had no knowledge of Kenpo and that this name in fact originated with the Inspectors, he does not specifically deny giving the Kenpo invoice to Inspector Maitland. What he affirms is that there was “no reason for me to believe that the invoice had in fact come from Kenpo”. While the Appellant went on at great length arguing that there was no evidence that the invoice was genuine, there was an obligation on Kenpo to adduce some evidence to demonstrate that this document was indeed not genuine and suggest a plausible reason why a supplier would issue a fake invoice. How would a supplier expect to be paid on a fake invoice? Who would be paid?
39. In addition, Mr. Huang maintains that Inspector Maitland, without permission or proper cause, entered his premises and violated his legal rights. It appears that this allegation is an attempt to taint Inspector Maitland’s evidence with a suggestion that it results from an illegal search. First of all, this is not a criminal investigation. Second of all, Right Way Market is a commercial establishment. Inspector Maitland does not require permission to enter such a premises. If store employees or the owner do not wish to talk to him, they do not have to; they can ask him to leave. On the evidence before us, the Panel is not persuaded that Inspector Maitland’s investigation was improper.
40. Finally, Mr. Huang maintains that he did not know that he was selling bootlegged cucumbers. This is simply not believable. As an owner of a produce market in the Lower Mainland, Mr. Huang should be well aware that certain vegetables are regulated and can only be obtained through an approved agency. It is difficult to accept that Mr. Huang was either not aware that BC Hot House was the only designated agency from which he could obtain Long English cucumbers in the Lower Mainland or alternatively, not aware that these cucumbers did not come from BC Hot House.
41. Essentially, the Appellant asked the Vegetable Commission and now asks this Panel to dismiss the charges against it due to the misconduct of the Vegetable Commission Inspectors. This alleged misconduct would appear to include illegally entering private property (Right Way Market), attributing statements to witnesses that were not made (identifying Kenpo as its supplier and producing contact phone

numbers), using coercion, threats and duress to obtain admissions and thereby “perverting justice” and “committing an offence for the purpose of entrapment”.

42. The Panel finds that these disturbing allegations of misconduct have been made with little if any factual basis. On the basis of the evidence before us, the Panel is not satisfied that the Vegetable Commission or its Inspectors have acted inappropriately. The elements of the breaches of the Vegetable Commission’s General Orders have been made out. The Appellant has not tendered any evidence to suggest that it exercised due diligence to prevent the breaches.

### **Bias of the Vegetable Commission**

43. The Appellant argues that there is material bias or an appearance of bias on the part of the Vegetable Commission sitting in an adjudicative capacity while having a pecuniary interest in cost recovery. The Appellant relies on the British Columbia Supreme Court decision in *Seliski v. Association of Naturopathic Physicians of BC*, [1996] B.C.J. No. 2560 (S.C.). In that case the Court found a reasonable apprehension of bias on the part of a disciplinary board that not only made the rules under which it imposed costs but also initiated the charges and held a hearing which lead to a finding of misconduct warranting penalties and payment of costs.
44. The Appellant further argues that the Vegetable Commission’s conclusion that it had been presented with evidence adequate to make out the two charges is further evidence of bias on the part of the Vegetable Commission. Given that the Panel has found that there was sufficient evidence before the Vegetable Commission, and there is clear evidence before this Panel from which to conclude that the alleged violations occurred, the Panel rejects the premise of this argument.
45. With respect to the bias argument as it relates to cost recovery, the Vegetable Commission argues first of all, that the Appellant is raising this issue for the first time before the BCMB. This issue was not raised before the Vegetable Commission and, as such, the Appellant must be taken to have waived its right to make this argument. Second, the Vegetable Commission argues that no reasonable apprehension of bias arises from its decision which was made pursuant to the licensing authority found in s. 11(1)(g) - (i) of the *Act* and ss. 9 and 12 of the General Orders. The Vegetable Commission also has the express authority in the *Act* to assess charges for services such as investigating, monitoring and enforcing its General Orders: s. 11(1)(o). A key part of the Vegetable Commission’s regulatory mandate is the monitoring and enforcement of the *Scheme* and General Orders. To ensure compliance, it is important that all regulated producers know that the Vegetable Commission will take active steps to prevent violations. The Vegetable Commission’s argument on this point is based on the established principle that no bias argument can be made where the legislation authorises the conduct that is alleged to give rise to bias – in this instance, the recovery of costs.

46. The Vegetable Commission distinguishes the *Seliski* case on the basis that the Vegetable Commission's enabling legislation is not silent on the issue of its authority to recover expenses and costs from those it regulates. The Vegetable Commission has made the decision to pass the costs of investigating violations on to those who have been found violating the *Scheme* and the burden of paying for the costs of monitoring and enforcement is placed on those producers who have created the need for monitoring and enforcement.
47. The Vegetable Commission argues that this case is more akin to *Pearlman v. Manitoba Law Society*, (1991), 84 D.L.R. (4<sup>th</sup>) 105 (S.C.C.), where the *Law Society Act* allowed the Law Society to order a lawyer guilty of professional misconduct to pay the costs and expenses associated with the investigation and hearing of the allegation. The Supreme Court of Canada rejected the argument that cost recovery would create a reasonable apprehension of bias in any reasonably well-informed person on the following grounds:
- 1) The costs recovered were a direct reimbursement for expenses previously incurred in an investigation, which uncovered legitimate grounds for imposition of sanctions.
  - 2) Any pecuniary interest of the Committee was too attenuated and remote to give rise to a reasonable apprehension of bias.
  - 3) Even if the monies recouped were applied to reduce member fees, the reduction of fees was simply too small to lead any reasonable person to believe that it might predispose Committee members towards a finding of guilt.
48. The Vegetable Commission argues that the evidence before this Panel leads to the same conclusion as in *Pearlman*. The \$3500 charged to Kenpo on account of investigation fees amounts to \$14 per grower. The Vegetable Commission's entire budget for investigations amounts to less than \$200 per grower per year. It is simply not reasonable to believe that the Commission members hearing this matter, each of whom run large agricultural operations, would be influenced by the recovery of such a small amount. Accordingly, the Vegetable Commission submits that no reasonable apprehension of bias arises as a result of the Vegetable Commission's direction that Kenpo pay \$3500 to cover the costs of the successful investigation.
49. The Panel agrees with the submissions of the Vegetable Commission. The proper course for a party to follow in alleging bias is to make that argument before the tribunal of first instance. The Vegetable Commission should have an opportunity to consider the issue of bias which decision would of course be subject to appeal. Given that the Appellant did not raise the issue of bias before the Vegetable Commission, it is not properly before the Panel.

50. The Appellant, in raising the bias argument makes a jurisdictional argument challenging the Vegetable Commission's authority to recover its costs of investigation upon the proof of a violation by a regulated producer. The Panel has considered this argument after reviewing the relevant legislation. The *Act* specifically grants marketing boards and commissions the power to set and collect licence fees from persons producing regulated product: s. 11(1)(g), and to classify persons growing regulated product into different groups and to collect fees for services from those persons: s. 11(1)(h). The *Act* also allows a marketing board or commission to set and collect levies or charges from persons engaged in the production of regulated product and to use those levies or charges to carry out the purposes of its scheme and to pay the expenses of the marketing board or commission: s. 11(1)(o). A marketing board or commission also has the power to make orders and rules necessary or advisable to promote, control and regulate effectively the production, transportation, packing, storage and marketing of a regulated product: s. 11(1)(q).
51. The *Scheme* vests the Vegetable Commission with the power to promote, control and regulate in any respect the production, transportation, packing, storage and marketing of the regulated product and expressly vests the Vegetable Commission with all the powers set out in s. 11 of the *Act*.
52. The Panel finds that the *Act* and *Scheme*, when read together, provide the Vegetable Commission with the regulatory authority to recover costs associated with the monitoring and enforcement of its regulations and General Orders on licence holders and regulated producers. Without the ability to monitor and enforce the provisions of the *Scheme*, the Vegetable Commission would be seriously impaired in ensuring compliance.
53. Accordingly, the Panel finds that the Vegetable Commission does have the authority to recover its costs of investigation upon the proof of a violation by a regulated producer. Further, it would seem unfair to burden those regulated producers operating within the regulated system with the entire cost of policing those who choose to act outside regulation. Fairness dictates that the burden of bearing enforcement costs rest primarily with those who create the need for enforcement.
54. As for the bias argument, the Panel agrees with the analysis set out in *Pearlman*. Given that the Vegetable Commission has the authority to recover its cost of investigation, the Panel does not agree that the Vegetable Commission's General Orders, which allow for cost recovery after the finding of a violation, lead to a reasonable apprehension of bias. Any pecuniary interest or benefit to a particular Vegetable Commission member in the order for costs, is so small and so remote that it is unreasonable to anticipate it would lead to even an appearance of bias against the Appellant.

55. Finally, even if this Panel is wrong on this issue and there is a reasonable apprehension of bias on the part of Vegetable Commission members solely by virtue of the order for investigation cost recovery, the full hearing before the BCMB cures any such bias: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561.

### **DISPOSITION OF APPEAL**

56. After considering the evidence before us on appeal and the submissions of the parties, the Panel finds that Kenpo violated General Orders #52 and #54. It follows that the appeal of both these violations is dismissed.
57. With respect to the allegations of bias, the Panel finds that no reasonable apprehension of bias arises by virtue of the Vegetable Commission's decision to recover its costs of investigation upon finding that a violation exists, and that even if such an argument had been made out, it would be cured by this Panel's full and independent consideration of the allegations.
58. It follows that the Panel does not take issue with the Vegetable Commission's decision to assess the Appellant \$3500 towards the costs of investigation. The Appellant had the opportunity both before the Vegetable Commission and before this Panel to raise any issue with how this amount was arrived at. Based on the evidence heard by the Panel, the sum of \$3500 reasonably reflects the Vegetable Commission's cost of investigation for these particular offences.

### **COSTS**

59. With respect to the issue of costs resulting from this appeal, s. 8(11) of the *Act* provides as follows:
- 8(11) In making its order or referral under subsection (9), the Provincial board may, if it considers it appropriate in the circumstances, direct that a party to the appeal proceeding pay any or all actual costs, within prescribed limits, as calculated by the Provincial board
60. This section gives the Panel express flexibility to award "any or all actual costs". Given the context and the legislative history, we take this to mean that it is open to the BCMB to direct that costs be paid as indemnification for costs incurred by the successful party, and to do so in an amount less than actual costs. The Panel does not wish to adopt as a general practice that "costs follow the event". However, given the Appellant's unproven allegations of misconduct on the part of Vegetable Commission Investigators and bias on the part of the Vegetable Commission as a result of its findings that such infractions were made out, the Panel finds that an award of costs is appropriate in the circumstances.
61. It is one thing to appeal, on the merits, the Vegetable Commission's finding that violations have occurred. However, to go further and accuse the Vegetable Commission of bias for coming to these conclusions on the evidence and to allege

misconduct on the part of its Inspectors is unfair and improper. These allegations evoke the words of Gibbs J.A. in *Adams v. Workers Compensation Board* (1989), 42 B.C.L.R. (2d) 228 (C.A.) at pp. 231-32:

This case is an exemplification of what appears to have become general and common practice, that of accusing persons vested with the authority to decide rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by a general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause. As I have said earlier, and on other occasions, suspicion is not enough.

62. The Vegetable Commission and its Inspectors have acted professionally and have done their utmost to act fairly and reasonably. Whether or not they erred on the merits is a very different thing from colluding against the Appellant. The Court in *Adams* stated that such allegations are to be discouraged. The only way to discourage a party in a situation such as this is with an award of costs incurred by the Vegetable Commission in responding to this appeal.
63. Having concluded that indemnification by way of legal costs is appropriate, we find that an order of actual costs would be unduly harsh and that indemnification on a basis less than actual costs is appropriate. We are satisfied that the proper balancing of factors is achieved in this case by directing that the Appellant pay the sum of \$3500 to the Vegetable Commission for the costs it incurred in this appeal.

## **ORDER**

64. The appeal relating to the violation of Orders #52 and #54 is dismissed.
65. The Vegetable Commission is entitled to recover its original investigative costs in the amount of \$3500. Should it still be necessary, Kenpo is also required to obtain a Class II Grower's Licence.
66. Finally, with respect to the issue of costs resulting from this hearing, the Panel orders that Kenpo pay forthwith to the Vegetable Commission an additional sum of \$3500.

Dated at Victoria, British Columbia, this 20<sup>th</sup> day of September, 2002.

BRITISH COLUMBIA MARKETING BOARD

Per

*(Original signed by):*

Christine J. Elsaesser, Vice Chair

Satwinder Bains, Member

Hamish Bruce, Member